

Self-Protecting Democracy and Electoral Rights

VB verfassungsblog.de/self-protecting-democracy-and-electoral-rights/

Madara Melnika , Julian Senders Mi 12 Sep 2018

Mi 12 Sep 2018



On October 6 the Republic of Latvia will hold its general election. The air is already sparkling with emotions: populism, fake news and other nowadays much discussed components of election campaigns are all part of it. Even the Constitutional Court of Latvia had its say in the upcoming events by delivering its judgment in case No. 2017-25-01 "*On the compliance of Article 5 (6) of the Saeima [Parliamentary] Election Law with Articles 1, 9 and 91 of the Satversme [Constitution] of the Republic of Latvia*". By rejecting the constitutional complaint of European Parliament Member Tatjana Ždanoka, this decision restates the rights of post-USSR countries to deny access to parliament to those people who actively tried to interrupt the regaining of independence.

The Judgment of the ECtHR

Followers of the case law of the European Court of Human Rights (ECtHR) should be familiar with the name *Tatjana Ždanoka* and the corresponding 2006 ECtHR decision. In that judgment, the ECtHR had to rule on passive electoral rights and developed the figure of the "democracy, capable of defending itself".

Ms. Ždanoka had challenged her disqualification from standing for election to the Latvian Parliament and to municipal elections arguing that it infringed her rights guaranteed by Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol No. 1), and Articles 10 and 11 of the European Convention on Human Rights (Convention). The main grounds of this complaint were the refusals by the Central Electoral Commission (CEC) in 1998 and 2002 to accept Ms. Ždanoka's application to run for the elections on the basis of Part 6 of the Article 5 of the Saeima Election Law, which states that "*the persons, who, after January 13, 1991, were active in the Communist Party of the Soviet Union (Latvian Communist Party) [...] cannot be registered as candidates for the Saeima elections and cannot be elected to the Saeima*". In 2004, the ECtHR held that there had been a violation of the Convention as well as its Protocol No. 1. However, after the judgment was appealed by the Latvian government, the ECtHR Grand Chamber held on 16 March 2006 by 13 votes to 4 that Latvia had not violated Article 3 of Protocol No. 1 of the Convention.

In its decision, the ECtHR carefully evaluated the history of Latvia. Separate attention was paid to the active role of the Latvian Communist Party (LCP) in Latvia's illegal accession to the USSR and the tragic events of January 1991 when, after the independence of Latvia had been declared, the LCP's failed coup led to the death of six people. The ECtHR recognized that the contested norm was not intended to punish anybody, but to exclude from the participation in the legislation process members of the party which had attempted to violently overthrow the newly-established democratic regime. Consequently, the ECtHR agreed that the exclusion of Ms. Ždanoka from standing as a candidate is in line with Article 3 of Protocol No. 1. Nevertheless, the Court also pointed to the fact that the Parliament of Latvia has an obligation to constantly review the statutory restriction, with a view to cancelling it in the near future.

The Judgments of the Constitutional Court

In 2000, the Constitutional Court rejected the complaint by 23 *Saeima* deputies on Article 5 Part 6 of the *Saeima* Election Law. Yet in 2006 the Constitutional Court of Latvia had to review the contested norm again after the complaint of 20 *Saeima* deputies. The case had its hearing on 16 May, only two months after the ECtHR decision was published – yet it already deals with the ECtHR conclusions.

In its reasoning the Court referred to its previous decision and noted that it lacked new circumstances needed to fully re-evaluate the norms. It thus mainly limited its analysis to the proportionality of the restrictions. The Court concluded that while the restriction is proportional in general, the imposition of long-term restrictions on people who, despite having worked in the specified organisations, are loyal to Latvia, would be incompatible with the protection of human rights.

Thus, the first steps towards a new understanding of the application of such restrictions were made.

Decision of June 2018

So how does the situation differ now? Ms. Ždanoka was and again is MP in the EP ¹⁾To be precise – In January 2018, Ždanoka announced plans to establish a mandate for MEPs and

stand for election to the *Saeima* elections and on 5 March, Miroslav Mitrofanov took over in her place in the European Parliament. and again had applied for participation in the Saeima elections. Yet again, the decisions were not in her favour. This time, however, more attention was paid not to past, but to current events.

The main question for the Constitutional Court was if, in 2018, there are still grounds for such a limitation which had been created in 1995 against a different political background: i.e., whether the restriction is *still* necessary, has a legitimate goal and is proportionate.

At first, the Court recognized that the purpose of the disputed norm is not to punish people for their participation in the specified organisations, but to protect the statehood of Latvia and its democratic system. Yet, while in 2006 the ECtHR stated that “[the] applicant’s current conduct is not a material consideration, given that the statutory restriction in question relates only to her political stance during the crucial period of Latvia’s struggle for democracy in 1991” the Constitutional Court noted that nowadays the norm must be viewed objectively to protect the constitutional organs from those people who after 13 January 1991 threatened the statehood of Latvia *and still continue to do so*. It was concluded that this norm is *one of the instruments of a defensive democracy protect Latvia’s constitutional organs*.

The Court then evaluated the proportionality of the norm and referred to inner and outer threats to a democratic order, which could be the basis for such a restriction. In connection to the inner threats the Constitutional Court strongly emphasized that for a big part of the Latvian society democracy is not yet a self-evident value – the sustainability of democracy can still be threatened. Regarding the outer threats, the Constitutional Court pointed out the aggression of Russia in Georgia in 2010 and in Ukraine in the recent years. Those threats justify the preservation of the restriction as the prohibition is directly connected to the possibility of anti-democratic representatives which in their past have been connected to Russian favouring powers being elected in a parliamentary position. The term “militant democracy,” coined by Karl Loewenstein, comes to mind which defines the form of constitutional democracy authorized to protect civil and political freedom by pre-emptively restricting the exercise of such freedoms.

Finally, while considering less limiting restrictive measures suitable for reaching the legitimate aim, the Constitutional Court noted the wide margin of appreciation that states enjoy in the organization of their electoral system. Important was also the individual nature of the application of the norm by the CEC. Ultimately, the Court did not find a breach of Articles 1 and 9 of *Satversme*.

Additionally, the Constitutional Court held that, in contrast to the arguments made by Ms. Ždanoka, those citizens of Latvia, which are subject to the contested norm, and other people, are in different and not comparable circumstances thus, also the principle of equality was not breached.

The Consequences for Ms. Ždanoka

It must be noted that this decision did not make a finding on Ms. Ždanoka’s specific case – in line of the division of powers the final word in the evaluation of Ms. Ždanoka as a deputy candidate rested with the CEC.

Indeed, Ms. Ždanoka had applied as candidate for the Vidzeme region. Her name was on the candidates list till August 21 when the CEC, in a special proceeding on the basis of the documents provided by the Security Police and the *Satversme* Protection Bureau, evaluated the applicability of the restrictions to her. After this proceeding on the same day – which, ironically, was also the 27th anniversary of the restoration of the de facto independence of Latvia – the name of Ms. Ždanoka was removed from the list. This decision was upheld by the administrative regional court.

Evaluation of the Decision and Questions for the Future

This judgement by the Constitutional Court of Latvia is truly considerate in the depth of its analysis – the opinions of *Saeima*, the Ministry of Justice, the Security Police, the Ombudsman and others were evaluated to come to the stated conclusion. It is clear that the state must care for its continuity and fight against individuals who would like to actively destroy it. In such a way this decision shows similarities to the actions taken in Germany last July when the *Grundgesetz* was amended to the effect that parties acting counter to the existence of the constitution or the state may not receive state funding – there the basis was idea that political parties seeking to abolish or endanger the state should not be supported by it.

Of course, one could argue that the *Bundesverfassungsgericht* did not prohibit the NPD – the party that was the main trigger for the amendment. The basis of this decision was, *inter alia*, the party's virtually inexistent political significance. Considering this point made by the German Constitutional Court, while looking at the low popularity of the party represented by Ms. Ždanoka as well as the threats that could be caused even if she managed to overcome the 5% barrier and to become one of 100 deputies, one has to wonder whether the reaction of Latvia has been proportional. However, the situation differs: Latvia had to fight for its independence and managed to regain it only 27 years ago. Thus, the *Ždanoka case* is not only about populism, human rights and the rule of law, but, unlike the situation in Germany, always revolves around the question, whether Latvia will retain its sovereignty.

From another perspective, the Constitutional Court noted in its decision 2005-13-0106 that “[i]n countries where the archives [...] of the former regime were available, it was possible to provide the public with the necessary information about the activities of each deputy candidate as a prerequisite for voters to decide whether the candidate was worthy to represent them.” The prerequisite for applying the restriction nowadays is the continuity of the actions threatening the state. However, those activities – which are not criminally punished, as then another restriction under the *Saeima* Election law would apply – are not a secret and can be analysed by every voter. Following the previous conclusion of the Constitutional Court, voters theoretically could now also be able to inform themselves about the trustworthiness of Ms. Ždanoka.

However, her being denied the right to stand as a candidate raises many questions: Can the state wrap a blanket around its citizens and try to protect them from making any mistakes? Do the fundamental norms of the democratic state allow lawyers and judges to decide instead of the citizens and so become social engineers? Where could one draw the line regarding interference in the free will of persons to choose their candidates? And,

finally, are those the real and only dangers we should be *protected* from? After all, no restrictions are applied to the deputy candidates that were not part of the organisations stated in the contested norm and have not committed an intentional criminal offense, but who could “still be dangerous to the principles of the democratic state”. If the main issue is the protection of democracy, it might be better to focus on that more broadly, and not just to analyse existing threats in connection to the 27-year-old past? However, that again raises the question of a forced protection of citizens and the legitimisation of the decision-makers – and it is also not one the Constitutional Court would have the competence to answer.

Ms. Ždanoka has stated that she will again turn to the ECtHR. One can only speculate if this time there will be a different outcome. The ECtHR indeed recognized that the Latvian institutions are better suited to assess the situation. However, it is doubtful whether the argument of “threats to the newly-established democracy caused by the resurgence and promotion of *communist ideas* which might lead to the restoration of a totalitarian regime” acknowledged in the 2006 decision still applies. It will thus be interesting to see how the ECtHR will evaluate the new arguments presented by the Constitutional Court of Latvia.

References [±]

1. ↑ To be precise – In January 2018, Ždanoka announced plans to establish a mandate for MEPs and stand for election to the *Saeima* elections and on 5 March, Miroslav Mitrofanov took over in her place in the European Parliament.

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Melnika, Madara; Senders, Julian: *Self-Protecting Democracy and Electoral Rights*, *VerfBlog*, 2018/9/12, <https://verfassungsblog.de/self-protecting-democracy-and-electoral-rights/>.